1995. Attached to this Order were Comments which appear to preclude all emulation activities, but which C2+ will show do not constitute valid rules which are binding on this court.

4. During 1995, John C. Nelson licensed certain computer software from C2+ which enabled him to perform emulations of cellular telephones. Nelson's activities apparently gave rise to the original action taken by HCTC in this suit. In all events, C2+ will show that such activities were not illegal. It will further show that Nelson was not its agent and in no event was C2+ liable for any of his actions.

ARGUMENTS

THE FIRST ESN ORDER DOES NOT RENDER EMULATION ACTIVITIES ILLEGAL

5. Neither of the so-called "Emulation Orders" referred to by HCTC precludes carriers, manufacturers, or C2+ from emulation activities. As for the first of these two supposed authorities, it dealt only with manufacture and design of cellular telephones, and not with activities such as those of C2+. Thus it may not be relied upon by HCTC for summary judgment purposes.

6. As indicated in Paragraph 10 of HCTC's Motion, the so-called First ESN Order is in fact a set of technical specifications for the manufacture of cellular telephones. The pertinent provision is found at 86 F.C.C.2d 593, 2.3.2. This subsection 2.3.2 of the technical specifications is vital to this case:

> 2.3.2 Serial Number
> The serial number is a 32-bit binary number that uniquely identifies a mobile station to any cellular system. It must be factory-set and not readily alterable in the field. The circuitry that provides the serial number must be isolated from fraudulent contact and tampering. Attempts to

> change the serial number circuitry should render the mobile station inoperative. (See Exhibit Six at p. 27681, attached and incorporated for all purposes to this Response.)

This requirement is clearly directed only to the manufacture and type-acceptance of cellular radio transceivers. Notice carefully the wording "not readily alterable in the field." In no way does 2.3.2 constitute an FCC order binding on C2+ or anyone else engaged in emulation activities after manufacture.

7. In any event, 47 CFR § 22.915 which is relied on in this regard by HCTC, did not mandate compliance with paragraph 2.3.2. It merely stated that:

> The technical specifications for compatibility of mobile and base stations in the Domestic Public Cellular Radio Telecommunications Service are contained in the Cellular System Mobile Station-Land Station Compatibility Specification (April 1981 Ed.) Office of Engineering and Technology Bulletin No. 53. See Exhibit Nine at p. 195, attached and incorporated for all purposes to this Response. See Exhibit Six at p. 27680.

Neither do, the EIA/TIA Standards mandate any such compliance. The September, 1989 version of the EIA/TIA Standard, which is an updated version of paragraph 2.3.2, actually states that the existence of the standards:

> ... shall not in any respect preclude any member or non-member of EIA/TIA from manufacturing or selling products not conforming to such Standards and Publications.....[See Exhibit Five, notice page, attached and incorporated for all purposes to this Response.]

[The compatibility requirements are expressly contained in Publication EIA/TIA-553 entitled Mobile Station-Land Station Compatibility Specifications, September 1989. See Exhibit Five at page V. An earlier version of the compatibility specifications are contained in Appendix D to Report and Order on CC Docket No. 79-318. See Exhibit

Six at p. 27680.]

8. If section 22.915 mandated compliance with subsection 2.3.2, why would the cellular carriers and the CTIA later urge the FCC to adopt new rules (22.919 and 22.933) which would contain mandatory language? In fact, subsection 22.933 now clearly mandates that phones type-accepted after January 1, 1995, as argued below, "must be designed" in compliance with the requisite specifications. See Exhibit Sixteen at p. B-78, attached and incorporated for all purposes to this Response. The same is true concerning new rule 47 CFR § 22.919 (See Exhibit Sixteen, p. B-77), which, unlike 2.3.2, makes it clear that ESN's on newly type-accepted phones may not be transferable. 2.3.2 merely says that the ESN must not be readily alterable in the field. Thus, the new rules which are much more specific, would have been unnecessary if the old rules were binding.

9. Furthermore, it was well-known and understood in the cellular telephone business at least up until issuance of the Second ESN Order that ESN transfers and C2+ type extension phones were not illegal. The Petition for Reconsideration of the Ericsson Corporation, a manufacturer of cellular telephone equipment, filed December 19, 1994, before the FCC, states that:

> Repair/replacement programs and the technology to make quick and easy ESN and other electronic changes to cellular terminals have been developed at the insistence of cellular carriers...See Exhibit Ten at p. 4 n. 4, attached and incorporated for all purposes to this Response.

10. Further, the reply comments of Motorola, Inc., filed November 5, 1992, at 2-3 before the FCC stated that:

> The ESN transfer practices described above do not undermine fraud detection or prevention. Indeed,the equipment certification program currently operated by CTIA permits these ESN transfer procedures...See Exhibit Eleven at p. 3, para. 7, attached and incorporated for all purposes to this Response.

("CTIA" refers to the Cellular Telephone Industry Association, the trade association of the cellular telephone carriers.) This statement by Motorola confirms that prior to January 1, 1995, CTIA was itself certifying ESN transfer procedures.

11. Prior to January 1, 1995, many cellular carriers hired C2+ to provide C2+ extension phones for their subscribers. See Affidavit of Carol Patton at Exhibit A with copies of evidence of related payments, attached and incorporated for all purposes to this Response as Exhibit Two.

12. Further, Nuts and Volts Magazine stated in its January 1994, edition that a significant amount of transferring of ESN's has been practiced throughout the cellular industry. See Exhibit Thirteen at p. 34, attached and incorporated for all purposes to this Response.

13. Also, prior to January 1, 1995, representatives of both the FCC and cellular carriers made public statements to the effect that no FCC rules existed which prohibited ESN transfers or C2+ extension phones. For example:

> Cloning a cellular phone's electronic serial number is not illegal....(attributed to Thomas Wheeler, President of CTIA in RCR, June 20, 1994; see Exhibit C attached to Exhibit Two.)

> The FCC has no legal empowerment over...companies associated with C-2 Plus Technology; nor is there a law or statute covering this type of activity. (BellSouth Cellular "Fraud Alert Bulletin," 94-01, March 3, 1994 at 3; see Exhibit D attached to Exhibit Two.)

> I don't know if we can say what C-2 Plus is doing is illegal... (Steve

> Markendorf, Chief, Cellular Branch Mobile Services Division, FCC, as quoted in Cellular Sales and Marketing, March 1993 at 9; see Exhibit E at p. 9 attached to Exhibit Two.)
>
> C-2 Plus and similar entities are not licensees and are not directly subject to our jurisdiction. (John Cimko, Chief of Mobile Services Division of the FCC as quoted in Cellular Marketing; see Exhibit E at p. 57 attached to Exhibit Two.)

14. Last year the agency's Wireless Telecommunications Bureau published a written agenda for a meeting convened on July 27, 1995 (described further below), which stated that OET-53, which incorporates paragraph 2.3.2, sets forth design criteria to be met by manufacturers as a condition of type acceptance of cellular telephones. See Exhibit Fifteen attached and incorporated for all purposes to this Response. The FCC has also admitted to C2+ employee Stuart Graydon that its Rules do not prohibit the use of emulated phones. See Exhibit 3, para. 16.

15. In the event HCTC, in any reply to this Response, should attempt to claim that the FCC at a later date clarified 2.3.2 to the effect that emulations were illegal, it would have to rely on the fact that on October 2, 1991, an employee of the FCC issued a "Public Notice" which alleged that 47 CFR § 22.915 incorporated paragraph 2.3.2 of OST Bulletin No. 53. See Exhibit Six. The FCC employee concluded in the "Public Notice" that phones with altered ESNs do not comply with FCC rules.

16. This "Public Notice" did not create an "FCC Rule," for a number of reasons including the fact that it did not conform with the requirements of the Administrative Procedures Act. See 5 U.S.C.A. § 553(b). (Mr. Blumenfeld also addresses the question of the Public Notice in his Affidavit marked Exhibit 14.) Also see Public Util. Comm'n

of California v. U.S., 356 F.2d 236 (9th Cir. 1966). Neither did a letter written on January 15, 1993, by an FCC employee to the CTIA, render 2.3.2 into a binding ruling. It is well settled law that the FCC can only act through its rules and orders and what a particular member or staff member might say a decision means is not relevant. In all events, 47 C.F.R. § 22.27 states clearly that public notices do not create rights in anyone. See Exhibit Nine at 109. See also United States v. Am. Tel. and Tel., 524 F.Supp. (D.D.C. 1981). In all events, such actions of FCC employees erroneously describe the actual import of 22.915 and subparagraph 2.3.2.

THE SECOND ESN ORDER IS FLAWED AND DOES NOT APPLY TO C2+

17. The so-called Second ESN Order is the heart of HCTC's Motion. However, it applies only to cellular telephones to be type-accepted in the future. (HCTC has made no allegations in this proceeding that C2+ emulated any phones type-accepted after January 1, 1995.) Further, this proceeding seeks to short-circuit ongoing reconsideration proceedings before the FCC by having this court issue a declaratory judgment based on a Report and Order which the FCC itself has essentially acknowledged to be deficient in terms of substance, procedure, and due process.

18. The Commission first released its Report and Order concerning Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services (CC Docket No. 92-115), 9 FCC Rcd. 6513 (1994) on September 9, 1994. See Exhibit Sixteen. The Report and Order did two things relevant to the matters at issue in this case. First, it adopted new rule Section 22.919 "to help reduce the fraudulent use of cellular equipment caused by tampering with the ESN of a cellular telephone. Report and

Order at Section 58. However, the Commission clearly stated that because "it would be impractical to apply the new rule to existing equipment...the ESN rule will apply only to cellular equipment for which initial type acceptance is sought after the date that our [new] rules become effective." Id. at Section 62. These new rules became effective on January 1, 1995. Id. at Section 112.

19. Second, the Report and Order also announced what the Commission subsequently has characterized as its "Policy Statement on Altering ESN or Knowing Use of a Cellular Telephone with Altered ESN" with respect to existing cellular equipment. See Agenda for July 27, 1995 Meeting " Addressing Petitions for Reconsideration of FCC Rule and Policy on Cellular Electronic Serial Number," issued by the FCC's Wireless Telecommunications Bureau on July 26, 1995, a copy of which is attached and incorporated for all purposes to this Response as Exhibit Fifteen. The portions of the Report and Order quoted by HCTC at page 5 of its complaint and in paragraphs 12 and 13 of its Motion are taken from this "Policy Statement." Although the Commission in its Notice of Proposed Rulemaking (see Exhibit Eighteen attached and incorporated for all purposes to this Response) requested comment only on the issue of whether its proposed rule would assist in fighting cellular fraud (i.e., calls by an "unauthorized user" using a phone programmed with a stolen ESN), the Policy Statement goes far beyond that issue and addresses matters concerning a legitimate cellular subscriber's use of an extension cellular phone, a matter on which the FCC provided no notice or opportunity to comment. Those matters include:

(1) whether cellular extension phones may cause operational problems for some cellular systems;

(2) whether carriers are entitled to a monthly revenue stream for every cellular phone in operation;

(3) whether cellular extensions would constitute unlicensed transmitters or would violate the cellular compatibility specification and type-acceptance rules; and

(4) whether the use of C2+ phones would violate the Communications Act and the then-existing FCC rules.

See Exhibit Sixteen at comments 60-62.

20. Because there was no notice of and opportunity to comment on these issues was given, the Commission has characterized its discussion of them as a "Policy Statement" rather than a substantive rule or order. See 5 U.S.C.§ 533(d). Moreover, the FCC plainly states in its Agenda for the July 27, 1995, meeting (described below) that its Policy Statement -- which it defines to include comments 60-62 of the Report and Order -- was "based on [three] assumptions" rather than supported by any record evidence in the rulemaking. The absence of any factual basis for the FCC's assumptions is evidenced by the three questions for discussion at the July 27 meeting -- which essentially ask whether there is any support for the three assumptions. See Exhibit Seventeen attached and incorporated for all purposes to this Response. Thus, the agenda of the meeting clearly demonstrates that the "Second ESN Order," upon which HCTC would have this court issue a summary declaratory judgment, is no more than; (a) a policy statement; (b) based on three assumptions; and (c) for which the FCC admittedly had no factual or other support at the time the assumptions were made.

21. The FCC now is considering for the first time – in the context of pending petitions for reconsideration – numerous factual, legal, and policy issues arising from

the unfounded assumptions upon which it based its previous conclusions. C2+ and several other parties, including cellular equipment manufacturers, have had timely-filed Petitions for Reconsideration of that Report and Order pending before the FCC since December 19, 1994. At no time during that period has the FCC sought to enforce either the "Second ESN Order," (47 C.F.R. §22.919), or the Policy Statement contained in the Report and Order, against C2+. To the contrary, the FCC took the highly unusual step of convening a meeting on July 27, 1995, to which it invited representatives of the Cellular Telecommunications Industry Association ("CTIA") (the cellular carriers' trade association), the Telecommunications Industry Association ("TIA") (the trade association of cellular equipment manufacturers), various cellular carriers (including affiliates of some of the owners of HCTC), the United States Department of Justice, C2+, and the Independent Cellular Services Association ("ICSA"), a trade association representing various providers of emulated cellular extension phone services. The purpose of the meeting was specifically to discuss and gather additional information concerning the issues raised in the C2+ Petition for Reconsideration. See Exhibit Seventeen. At the conclusion of that meeting, the FCC staff specifically requested that C2+ submit a proposed rule that would expressly authorize its service, which C2+ did on August 10, 1995. Thus, the relevant issues concerning a cellular subscriber's use of extension cellular phones remain squarely before the FCC. This court should not prejudge those issues by entering a summary declaratory judgment based on the Policy Statement language contained in comments 60-62 of the Report and Order.

22. In addition, this court should not enter a summary judgment based on the

language of comments 60-62 of the Report and Order -- particularly the language quoted by HCTC at paragraphs 12 and 13 of HCTC's motion -- because that Policy Statement is not independently enforceable against anyone.

23. In this regard, authorities are ample. A general statement of policy is not finally determinative of the issues or rights it addresses. Pacific Gas & Elec. Co. v. Federal Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974). A statement of policy has no legal efficacy unless properly published in accordance with the Administrative Procedures Act. Hartnett v. Cleland, 434 F. Supp. 18 21 note 7 (D.C. S.C. 1977). Interpretive rules or policy statements lack binding effect. Dyer v. Secretary of Health and Human Serv., 889 F.2d 682, 685 (6th Cir. 1989).

24. An agency policy statement "does not establish a 'binding norm'...[and] is not finally determinative of the issues or rights to which it is addressed." Pacific Gas & Elec. Co. v. Federal Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974). Because the agency retains discretion with respect to the matters addressed in the Policy statement, such a statement cannot "foreclose alternative courses of action or conclusively affect rights of private parties." Batterton v. Marshall, 648 F.2d 694, 702 (D.C. Cir. 1980)(emphasis added). Further considerable authority exists indicating that administrative rules not issued in accordance with the notice requirements of 5 U.S.C. § 553(b) are in fact void. See Dow Chemical v. Consumer Prod. Safety Com'n, 458 F.Supp.378, 390 (U.S.DC. W.D. La. 1978), and Rivera V. Putino, 524 F. Supp. 136, 147 (N.D. Cal. 1981). Each time that it seeks to rely on a policy statement, an agency "must be prepared to support the policy just as if the policy statement had never been

issued." Pacific Gas & Elec. Co. v. Federal Power Comm'n, 506 F.2d at 33, 38. Thus, policy statements are not afforded the same deference as substantive agency rules upon judicial review. In Bechtel v. F.C.C., 10 F.3d 875, 878 (D.C.Cir. 1993) the court held that:

> Policy statements are exempt from the Administrative Procedure Act's notice-and-comment requirements, see 5 U.S.C. §553(b), and hence may take effect without the rigors-and presumed advantages of that process. The price to the agency is that the policy 'is subject to complete attack before it is finally applied in future cases'. (Emphasis added)

In McLouth Steel Prod. Corp. v. Thomas, 838 F.2d 1317 (D.C.CIR. 1988), the court held:

> ...if the pronouncement is a statement of policy rather than a rule, [w]hen the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement has never been issued...agency's allowing substantive attacks on agency statement at each application supports characterization of the statement as policy rather than rule.

Based on McLouth Steel, Pacific Gas, and Bechtel, no summary judgment can be granted as to the issue of whether C2+ violated the "Second ESN Order" since the comments to the Rules which HCTC is trying to enforce against C2+ are mere policy statements which are subject to complete attack each time they are applied.

25. In the event HCTC would enforce the comments to the January 1, 1995, rule through 47 U.S.C. § 401(b). As established above, such comments are nothing more than policy statements which do not form part of the Second ESN Order. Section 401(b) would give HCTC the right to enforce any FCC rule in cases where a violation by C2+ caused it damages. However, Section 401(b) clearly states that a rule can be enforced only while in effect. The discussion contained in this Response shows that the comments

are either unenforceable or void. At best, the comments are subject to complete attack in the event a party seeks to enforce them under Section 401(b). See Bechtel v. F.C.C., 10 F.3d 875, 878 (D.C.Cir. 1993). Also see McLouth Steel Prod. Corp. v. Thomas, 838 F.2d 1317 (D.Cir. 1988). Clearly, HCTC cannot obtain a greater measure of reliance on an FCC policy statement than that to which the FCC itself would be entitled if it sought to enforce the Policy Statement directly against C2+, something which it has not done since it was adopted.

IN ALL EVENTS, HCTC MAY NOT OBTAIN A SUMMARY DECLARATORY JUDGMENT BECAUSE OF OTHER FEDERALLY PROTECTED RIGHTS

26. Even if the ESN orders were not badly flawed, this court should not issue the summary declaratory judgment sought by HCTC because that judgment would directly contradict the "federally protected right" of a telephone subscriber "to reasonably use his telephone in ways which are privately beneficial without being publicly detrimental." Hush-A-Phone Corp. v. U.S., 238 F 2d 266 (D.C. Cir. 1956). On remand of that decision, the FCC held that "an inescapable consequence of the Court's opinion is to render...tariff regulations unjust and unreasonable insofar as they may be construed or applied to bar a customer from using other devices which serve the customer's convenience in his use of the facilities furnished by the defendants and which do not injure the telephone companies' employees or facilities." Hush-A-Phone, 22 FCC 112, 113-114 (1957). As a result, the Commission concluded that the restrictions in question constituted an unjust and unreasonable act or practice in violation of Section 201(b) of the Communications Act. Also see the recent FCC ruling in "the stutter dial tone case" (September 28, 1995), a copy of which is attached as Exhibit Eight and is incorporated

for all purposes to this Response.

27. In Carterfone, 13 FCC 2d 420, recon. den. 14 FCC 2d 571 (1968), the FCC held that in addition to being unjust and unreasonable, a common carrier's restrictions on use of non-injurious customer-provided equipment are unduly discriminatory in violation of Section 202(a) of the Communications Act where the carrier approves its own equipment for use:

> Even if not compelled by the Hush-A-Phone decision, our conclusion here is that a customer desiring to use an interconnecting device to improve the utility to him of both the telephone system and a private radio system should be able to do so, so long as the interconnection does not adversely affect the telephone company's operations or the telephone system's utility for others. A tariff which prevents this is unreasonable; it is also unduly discriminatory when, as here, the telephone company's own interconnecting equipment is approved for use. The vice of the present tariff, here as in Hush-A-Phone, is that it prohibits the use of harmless as well as harmful devices.

Thus, Carterfone clearly "placed the burden of proof squarely upon the carriers - not the users or the FCC - to demonstrate that a particular unit or class of customer-provided equipment would cause either technical or economic harm to the network". Interstate and Foreign Message Toll Telephone Service (MTS) and Wide Area Telephone Service (WATS), 56 FCC 2d 593, 596 (1975). Absent such evidence, a common carrier's prohibition on the use of the customer-provided equipment violates Sections 201 and 202 of the Act. See Hush-A-Phone and Carterfone.

28. In this connection, it is extremely important that cellular carriers are deemed by statute to be common carriers subject to the provisions of sections 201 and 202 of the Communications Act with respect to their provision of commercial mobile services. 47 U.S.C. §332(D)(I); 47 C.F.R. §20.9. Consequently, the burden clearly is on a cellular

telephone carrier to demonstrate economic or technical harm to the network, in this case, harm resulting from the use of cellular extension phones by legitimate subscribers -- as opposed to the use of cloned phones with stolen ESNs by unauthorized users -- in order to justify a prohibition. However, the carriers have failed to submit any such evidence to the FCC. To the contrary, Dr. Richard Levine's opinion, attached, concludes among other things that:

(1) There is no case of any burden or harm to the network or to other subscribers due to proper use of emulated extension cellular phone sets. There is no problem of incompatibility or interference with anti-fraud techniques in any case of proper use of emulated extensions.

(2) In no case is there any general network harm or harm to other customers resulting from the use of emulated extension mobile stations by bona fide cellular customers, unless the cellular system is improperly or incompetently operated by the carrier.

(3) The advantages of the emulated extension over services such as MUSDN relate to system simplicity, economy of resource use, and a superior level of service to the customer since all of the multiple emulated extension mobile stations are capable of roaming temporarily selecting the competitive carrier, while all but one of the MUSDN-type extensions are not. Furthermore, the emulated extension does not require the carrier to expend any resources for either initial activation or on a continuing or recurring basis for additional emulated extensions.

29. The cellular telephone carriers have never rebutted these conclusions and to date have filed no response or reply to Dr. Levine's Report. Obviously, such Report directly contradicts certain allegations of harm contained in Mr. Hanafin's Affidavit, attached to HCTC's Motion. These, along with the requirements of Hush-a-Phone and Carterfone, constitute factual disputes which alone should be easily sufficient to preclude a grant of HCTC's motion.

30. C2+ does not believe that 47 (C.F.R. § 22.915) contain any mandatory

language. However, if this court should find that 22.915 does contain such language, it should review page 27666 of the Report and Order in CC Docket Number 70-318, referenced in DFR 22.915 (a) and attached as Exhibit Six to this Response. Such Report and Order states:

> With respect to the questions of tarriffing the provision of mobile units, we see no reason why mobile units used in conjunction with cellular systems should be treated differently than other customer premises equipment. Under our Second Computer Inquiry, new terminal equipment is to be deregulated [i.e., unbundled and detariffed] after March 1, 1982. Because cellular service is a new service for which its mobile equipment has never been tariffed, we will require that it be unbundled and detariffed from the start.

C2+ allows a consumer with an existing cellular phone to add a second cellular phone as an extension of the first, using the same line and number. See Exhibit Two, Affidavit of Carol Patton at para. 2. The unrebutted Report of Dr. Levine provides additional evidence that C2+ phones are legitimate cellular extension phones "primarily beneficial" without being "publicly detrimental." Therefore, HCTC's arguments that the C2+ phone deprives it of monthly fees are without merit. Certainly a jury question exists as to whether C2+ phones are customer premises equipment for which the carriers cannot charge. Even if Section 22.915 is mandatory and binding, Hush-A-Phone and Carterfone clearly state that no FCC rule can prohibit a consumer from using his phone in ways which are "privately beneficial" without being "publicly detrimental." Therefore, HCTC's Motion For Partial Summary Judgment must be denied based on the fact questions created by the Dr. Levine's Report, regardless of either the First or the Second ESN Order.

HCTC'S NEGLIGENCE CLAIMS ARE SUBJECT TO NUMEROUS FACT ISSUES

31. C2+ incorporates its above discussion concerning the large number of questions challenging HCTC's allegations that C2+'s actions have been illegal. In such a context, it seems apparent that many fact questions exist as to what C2+ and its employees knew, what C2+ should have known, and when it knew these facts. Thus HCTC is not entitled to summary judgment on its two negligence claims. In this regard, see the Affidavits of Carol Patton and Stuart Graydon attached respectively as Exhibits Two and Three.

IMPORTANT FACT ISSUES EXIST ABOUT ISSUES OF AGENCY AND DAMAGES

32. HCTC's relies on easily challenged assumptions in its claims that John Nelson was an agent of C2+. In Texas, agency normally requires clear consent from the principal before the agent can act in its behalf. Agency is a fiduciary relationship in Texas which results from consent by one person to the other to act subject to his control. Texas Processed Plastics, Inc. v. Gray Enter., Inc., 592 S.W.2d 412, 416 (Tex. Civ. App.-Tyler, 1979, no writ, quoting Restatement 2nd Agency S 1.) No agency can exist without a consensual relationship. Green v. Hannon, 369 S.W.2nd 853, 856 (Tex. Civ. App.-Texarkana, 1963, writ ref. n.r.e.).

33. The record contains no evidence to show that Nelson was ever more than an entrepreneur acting in his own behalf and utilizing C2+'s software and expertise. Certainly, no evidence has been produced that C2+ consented to any agency relationship, or appointed Nelson its agent. Nor has HCTC proven any damages in this

case, beyond bold assumptions of harm. At best, HCTC has raised fact questions about agency and its possible damages, thus precluding any summary judgment on these issues.

SUMMARY AND CONCLUSION

The foregoing discussion raises strong doubts that C2+ emulations are illegal or that HCTC has suffered any damages susceptible to relief in this action. In summary:

(1) The First ESN Order dealt with technical design criteria only; in no event could it serve as a binding rule prohibiting emulations.

(2) The Second ESN Order applies only to cellular telephones type-accepted by the FCC on or after January 1, 1995; HCTC has not alleged that nay such phones have been emulated by C2+.

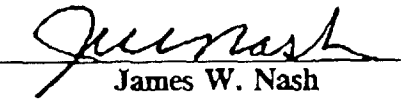
(3) Even if the Second ESN Order did prohibit emulated phones, it is nevertheless subject to attack under the Hush-a-Phone doctrine, which would in all events require factual inquiries and evidence concerning the nature of the equipment and its use.

(4) Significant fact questions exist concerning a number of issues, including the nature of Nelson's relationship to C2+, as well as any damages to HCTC.

Accordingly, HCTC's Motion should be denied in whole.

Respectfully submitted,

NASH & ORLANDO, L.L.P.

By: 

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CERTIFICATE OF SERVICE

I, James W. Nash, hereby certify that a true and correct copy of the above C-Two Plus Technology, Inc.'s Response in Opposition to Plaintiff's Motion for Summary Judgment has this day been sent to the following individuals:

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VIA MESSENGER

Signed this 12th day of February, 1996

James W. Nash

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HOUSTON CELLULAR TELEPHONE COMPANY	§	C.A. NO. 95-617
V.	§	
JOHN C. NELSON, individually and d/b/a both CELL TIME CELLULAR and ACTION CELLULAR and DANNY HART, individually and d/b/a both ACTION CELLULAR and ACTION CELLULAR EXTENSION	§	

HOUSTON CELLULAR TELEPHONE COMPANY'S
REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

As shown by Houston Cellular Telephone Company (Houston Cellular) in its motion for summary judgment, the FCC has prohibited and declared unlawful C-Two Plus Technology, Inc.'s (C2+) conduct of emulating ESNs of cellular telephones. To defeat Houston Cellular's motion (and two FCC Orders prohibiting emulation), C2+ relies on press clippings, selectively edited excerpts from documents (none of which are official FCC documents), and a meeting agenda. Because C2+ fails to provide any *legal authority* showing its ESN emulation activities are not illegal under the First and Second ESN Orders, Houston Cellular is entitled to judgment in its favor as a matter of law.

A. THE FIRST AND SECOND ESN ORDERS PROHIBIT C2+'s UNLAWFUL EMULATION ACTIVITIES

1. In the First ESN Order the FCC adopted Rule 22.915, which requires each cellular telephone to have a unique ESN. Contrary to C2+'s argument, the FCC did not limit the rule to only manufacturers. In an official FCC publication interpreting Rule 22.915, released October 2, 1991, FCC Public Notice Report No. CL-92-3, the FCC stated phones with altered ESNs "do not comply with the Commission's rules and *an individual or company operating such phones or performing such alterations* is in violation of Section 22.915 of the Commission's rules and could

be subject to appropriate enforcement action."[1] (emphasis added) *See* FCC Public Notice Report No. CL-92-3 attached to this reply as Exhibit A.

2. In the Second ESN Order,[2] the FCC clarified that ESN emulation violates its rules and the Federal Communications Act and that the Order applies to *any entity* (including C2+) that unlawfully emulates ESNs. The FCC specifically addressed and rejected a proposal *by* C2+ (not a manufacturer) to allow companies to emulate ESNs. *See* Second ESN Order at paragraph 57 (portions of the Second ESN Order are attached to this reply as Exhibit B. The entire Order is attached to Houston Cellular's motion for summary judgment). In the Second ESN Order, the FCC found:

> *with regard to existing equipment*, we conclude that cellular telephones with altered ESNs do not comply with the cellular system compatibility specification [old 22.915] and thus may not be considered authorized equipment under the original type acceptance...We further believe that *any individual or company* that knowingly alters cellular telephones to cause them to transmit an ESN other than the one originally installed is aiding in the violation of our rules (emphasis added).[3]

See Paragraph 62 of the Second ESN Order.

3. The Second ESN Order, which was adopted pursuant to lawful notice and rule making proceedings under the APA, prohibits individuals, *inter alia*, from using cellular phones with altered ESNs or from altering ESNs in cellular phones. The Second ESN Order is therefore a legally binding order. *See South Central Bell Telephone Company v. Louisiana Public Service Commission*, 744 F.2d 1107 (5th Cir. 1984), vacated on other grounds, 106 S.Ct. 2884 (An FCC

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[1] The FCC's interpretation of its own rules is entitled to deference by the court. *See* ***Washington Association for Television & Children v. FCC***, 712 F.2d 677 (D.C. Cir. 1983). (FCC's interpretation of its own policies and regulations is entitled to deference by the court).

[2] The Second ESN Order was adopted as part of a comprehensive revision of Part 22 of the rules regarding Public Mobile Services (which includes rules relating to cellular service). In the rulemaking, the FCC "proposed changes to almost every rule in Part 22." *See* Paragraph 4 of Second ESN Order. Thus, C2+ incorrectly argues the industry "urged" the FCC to adopt new rules containing mandatory language. Rather, Rule 22.919 was adopted as part of a revision and review *of all* the existing rules in Part 22.

[3] The Second ESN Order clearly demonstrates that the prohibition against emulating ESNs was without reference to the January 1, 1995, date. The January 1, 1995 date was the date by which manufacturers of new cellular phones were required to comply with the technical criteria adopted in Section 22.919 and 22.933. *See* Second ESN Order.

declaration is an "order" if the "agency acts in accordance with its legislatively delegated rule making authority" and intends it to be binding on all applicable persons).[4]

B. C2+ PROVIDES NO SUMMARY JUDGMENT EVIDENCE OR LEGAL AUTHORITY TO SHOW THE ESN EMULATION ORDERS ARE NOT BINDING ON C2+

4. C2+ argues the court should disregard the Second ESN Order because, according to C2+, paragraphs 60 and 62 of the Order are merely a "policy statement" [5]. As authority, C2+ cites an unpublished meeting agenda of unknown origin. The only reference to the FCC is a fax cover sheet from Steve Markendorf to C2+'s attorney. On its face, the agenda bears no indication it is an official FCC document (the agenda is not on agency letterhead, no author is identified, and the agenda does not appear in the official FCC record except under cover of C2+'s letterhead). See Exhibit 15 to C2+'s response to motion for summary judgment. The agenda therefore *does not dispute* that the FCC in the Second ESN Order found the emulation activities of C2+ illegal.

5. C2+ also requests the court disregard the FCC ESN Orders and rely instead on press clippings and selectively edited excerpts from various documents (none of which are official FCC documents) to determine the legality of ESN emulation. C2+ cites, for example, a comment in the BellSouth Cellular "Fraud Alert Bulletin" that "the FCC has no legal empowerment over...companies associated with C2+ Technology...." to support its argument. Yet, C2+ fails to provide any reason the court should regard the reporter's statement as authoritative, and C2+ omits

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[4] C2+'s alleged lack of notice is not true. The Second ESN Order was adopted pursuant to two separate notices, and interested parties, including C2+, filed comments. *See* Part 22 of the Commission's Rules Governing the Public Mobile Services, CC Docket No. 92-115, Notice of Proposed Rule Making, 7 FCC Rcd 3658 (1992); Further Notice of Proposed Rule Making, 9 FCC Rcd 2596 (1994). The record in that proceeding clearly reflects that C2+ requested the FCC address the ESN question and in response the Commission found that emulating ESNs was illegal. *See* Paragraph 57 of Second ESN Order. C2+ cannot now ask this court to ignore this fact by arguing it had inadequate notice. ***See Public Service Commission of District of Columbia v. FCC***, 906 F.2d 713, 717-18 (D.C. Cir. 1990) (an adopted rule is a logical outgrowth of proposed rule where changes between the adopted and proposed forms resulted from reasonable accommodation of comments filed by interested parties).

[5] Interestingly, C2+ filed a petition for reconsideration of the Second ESN Order. Obviously, at that time, C2+ believed the Report and Order contained the FCC's findings and determinations, rather than merely policy.

the portion of the bulletin citing "the official position of the FCC" that "it is a violation of Section 22.915 for an individual or company to alter or copy the ESN of a cellular telephone...." *See* Exhibit 2 (D) to C2+'s response to motion for summary judgment. Similarly, C2+ quotes Steve Markendorf (an engineer at the FCC) stating "I don't know if we can say what C-2 Plus is doing is illegal," but C2+ provides no grounds for relying on Markendorf's statement and C2+ deletes Markendorf's conclusion that "from what we've seen of it, it is not in accord with FCC rules and regulations." *See* Exhibit 2 (E) to C2+'s response to motion for summary judgment. Houston Cellular requests the court disregard these sources, which are nothing more than selectively edited comments and editorials with no authoritative weight.

6. Further, C2+ is not excused from complying with the FCC's ESN orders simply because it filed a petition for reconsideration. A petition for reconsideration does not stay the effectiveness of a rule. Section 1.106 (n) of FCC rules states:

> Without special order of the Commission, the filing of a petition for reconsideration shall not excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement.

47 C.F.R. 1.106 (n). A copy of section 1.106 (n) is attached to this reply as Exhibit C. Moreover, the FCC specifically considered and denied a stay request of the ESN rule. *See* Exhibit 17 to C2+'s response to motion for summary judgment. Therefore, the Second ESN Order, which the FCC refused to stay, is binding on C2+ as a matter of law.

C. C2+ DOES NOT HAVE A FEDERALLY PROTECTED RIGHT TO EMULATE ESN'S

7. C2+ does not have a "federally protected right" to engage in unlawful emulation. The FCC has found that ESN emulation is publicly detrimental and violates the FCC's rules and the Communications Act. Therefore, *Hush-A-Phone Corp. v. U.S.*, 238 F.2d 266 (D.C. Cir. 1956) and *Carterfone*, 13 FCC 2d 420 (1968) do not support C2+'s theory of a protected right.

8. In *Hush-A-Phone*, the Court found it was unreasonable to prohibit the use of a plastic mouthpiece because it had no affect on "anyone other than the two parties to the conversation" and thus was not publicly detrimental." *Hush-A-Phone*, 238 F.2d at 269. Emulating ESN's however, clearly effects more than the two individuals on the phone call. As the

FCC has found, emulating phones perpetuates fraud on the cellular carrier, it is disruptive of the carrier's internal record keeping, and it facilitates the use of unlicensed transmitters in violation of the Communications Act. *See* the Second ESN Order at Paragraph 60.

9. Similarly, *Carterfone* does not excuse C2+ from complying with the ESN Orders because Houston Cellular does not prohibit customer provided cellular phones and does not offer an "extension" phone service. In *Carterfone*, the FCC found it was unreasonable to prohibit the interconnection of customer supplied equipment "so long as the interconnection does not adversely affect the telephone company's operations or the telephone system's utility for others" and that it was discriminatory where the telephone company permitted such interconnection of its own equipment while denying others to interconnect. *Id.* at 424. Houston Cellular does not prohibit interconnection of customer supplied equipment — only equipment that does not comply with FCC rules and the Communications Act. Moreover, Houston Cellular does not offer "extension" phones, thus the prohibition is not discriminatory. [6]

10. C2+'s argument that Houston Cellular failed to meet its burden of showing harm lacks merit and is not supported by any legal authority. [7] As established by Houston Cellular, the FCC has found the use of cellular phones with emulated ESNs is harmful to the cellular carrier's system; that emulation deprives cellular carriers of legitimate revenues (which must be borne by legitimate customers); and that emulating phones harms the public generally. See Second ESN Order at Paragraph 60.

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[6] C2+'s reliance on CC Docket No. 79-318 does not require a different result. See C2+'s Response to motion for summary judgment at paragraph 30. Docket No. 79-318 required only that cellular equipment, like other customer premises equipment, be offered for sale on an unbundled, untariffed basis, not the manipulation of such phones to defraud the telephone company of legitimate revenues. More importantly, that docket established certain technical criteria for phones and preempted states from regulating the sale of such phones. The FCC did not restrict its own authority to regulate in this area. In fact, the FCC has a variety of regulations relating to technical criteria. Thus, Docket No. 79-318 does not bear on the instant proceeding. In any event, Houston Cellular allows customers to supply their own "legal" cellular equipment and offers cellular service on an unbundled basis. That Docket clearly does not permit companies like C2+ to violate the FCC's rules and Communications Act by altering the ESN of a cellular phone.

[7] C2+ submits the "opinions" of Dr. Richard Levine as authority for its view. Dr. Levine's opinions have no bearing on the legality of emulating ESNs.

D. C2+ PROVIDES NO SUMMARY JUDGMENT EVIDENCE DISPUTING NELSON'S STATUS AS AN AUTHORIZED AGENT of C2+

11. The summary judgment evidence before the court shows John C. Nelson was authorized and encouraged by C2+ to use its equipment, software, advertising ideas, forms and documents, expertise, customer referrals, and other resources to emulate ESNs of cellular phones. As shown in Houston Cellular's motion, in many instances Nelson and C2+ worked together to emulate ESNs of cellular phones. Because C2+ provides no summary judgment evidence to dispute these facts, Houston Cellular is entitled to judgment as a matter of law that John C. Nelson was the authorized agent of C2+.

CONCLUSION

For the reasons in this reply, Houston Cellular is entitled to judgment as a matter of law holding C2+ liable for emulating the ESNs of Houston Cellular customers and for such other relief, at law or in equity, to which Houston Cellular is entitled.

Respectfully submitted,

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